Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 91-1201

In The

Supreme Court of the United States

October Term, 1991

VINCENT F. SHUTT,

Petitioner,

v.

SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SANDOZ CROP PROTECTION CORPORATION AND ZOECON CORPORATION IN OPPOSITION

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No. 91-1201

In The

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VINCENT F. SHUTT,

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v.

SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SANDOZ CROP PROTECTION CORPORATION AND ZOECON CORPORATION IN OPPOSITION

OPINIONS BELOW

The Opinion of the court of appeals is reported at 923 F.2d 722 and the Orders and Amended Opinions of the court of appeals are reported at 934 F.2d 186 and 944 F.2d 1431.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991, and a timely petition for rehearing was filed on January 28, 1991. (Respondents Appendix 1.) On May 31, 1991, the court of appeals, without ruling on the petition for rehearing, entered its order and amended opinion. On June 13, 1991, another petition for rehearing was filed and on September 25, 1991, the court of appeals denied the petition for rehearing. (Respondents Appendix 2.) On September 30, 1991, the court of appeals further amended the opinion filed on January 16, 1991. The petition for a writ of certiorari was initially filed on December 30, 1991, 96 days after the court of appeals denied the petition for rehearing[1]. Accordingly, because the petition for certiorari was not filed timely per Supreme Court Rule 13.4, this Court has no jurisdiction over the petition.

STATEMENT

1. In 1986, Sandoz Corporation purchased the assets of the agricultural chemical business of Velsicol Chemical Corporation. Following this purchase, this business was known as VS Crop Protection Corporation (VS Crop). In May 1986, Sandoz announced that it would merge VS Crop with the agricultural chemical business of one of its

[1] The Clerk of this Court refused to accept the Petition for filing because it failed to comply with Supreme Court Rules. On January 21, 1992, Petitioner re-filed his Petition with the Court. Respondents received this corrected Petition on January 24, 1992.

other subsidiaries, Zoecon Corporation (Zoecon), effective June 2, 1986. At that time, Zoecon employees would become subject to the management of VS Crop, and the merged entity would be known as Sandoz Crop Protection Corporation.

VS Crop was a much larger operation than Zoecon. VS Crop had 85 sales representatives in an equal number of sales territories and its 1985 sales totaled $100 million, whereas Zoecon had only 21 sales representatives in 21 sales territories and $21 million in sales in 1985. VS Crop's sales were dominated by a few products such as Banvel, a dicamba-based herbicide. Zoecon's products did not include Banvel or any other dicamba-based herbicide.

In the reorganization under the supervision of VS Crop, 79 sales territories were created. Because the combined sales forces of Zoecon and VS Crop totaled 106 sales representatives, there were 27 more sales representatives than there were sales territories. It became a business necessity for a number of salesmen to be terminated. All of the persons making decisions for the merged company were former managers of VS Crop.

The termination decisions were based on subjective evaluations of the work of the salesmen. Because the new managers were not familiar with Zoecon they relied in part on a ranking of salesmen for Zoecon made by Zoecon's former national sales director. This ranking was not followed slavishly. For example, Mike Svoboda, age 63, who was ranked eighth in the Western Region, was offered a chance at a transfer, while Petitioner, who was ranked seventh in the Western Region, was terminated. In

the Eastern Region the two men at the top of the list, who were over age 40, were retained, but of the five men at the bottom of the list two were also retained who were under age 40 and three were discharged who were respectively 66, 38 and 54. Petitioner, then age 56, had been a Zoecon salesperson in a territory that included Washington, Oregon, Idaho, and Montana. At the same time, VS Crop employed four sales representatives in the Pacific Northwest whose combined territories basically mirrored Petitioner's territory.

In the combined pool of 106 VS Crop and Zoecon sales representatives, there were 32 employees over age 40 and 74 employees under age 40 before the reduction in force. Of the 21 Zoecon sales representatives, 11 were age 40 or older and 10 were under age 40. Six of the Zoecon salesmen were terminated, one was given a chance to transfer, and 14 were retained. Of the six who were terminated, five were age 40 or older. Petitioner was among the Zoecon sales representatives who were terminated. Of the VS Crop salesmen terminated, two were over age 40 and two were under age 40. In all, 21 of the 85 original VS Crop sales representatives were over age 40.

Petitioner's discharge was effective July 15, 1986. VS Crop Management retained the four former VS Crop salesmen, of whom three were under age 40, to cover their Pacific Northwest territories.

2. Relying on the discharge of the seven Zoecon sales representatives, the district court concluded as a matter of law that the manner in which individual VS Crop and Zoecon sales representatives had been chosen for retention "had a harsh, disparate and discriminatory

impact on Zoecon sales representatives age 40 and over, including the plaintiff [Vincent Shutt]." The district court gave judgment for Petitioner, which Respondents appealed.

3. On January 16, 1991, the court of appeals reversed the judgment of the district court and remanded the cause with instructions that judgment be entered in defendants' favor. Initially, the court of appeals, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988), noted that in a disparate impact case the statistical disparities must be "sufficiently substantial that they raise . . . an inference of causation" and that statistical evidence may not be probative if the data are "small or incomplete." The court of appeals went on to note that in reaching its decision as to disparate impact liability, the trial court had focused on "an exceedingly small class of employees, the 21 former salesmen of Zoecon." Focusing on the discharges in both the Zoecon and VS Crop sales forces, the court of appeals noted that there were seven discharged who were age 40 and over and four discharged who were under age 40. The court of appeals went on to explain:

> The group of 11, however, is so small that it does not alone suffice to establish a statistical pattern that could conclusively be identified as discriminatory. Moreover, Shutt concedes that there was no discrimination against the former Velsicol/VS Crop group. The employment practice to which he objects he contends was directed only against the Zoecon group. The Zoecon group does not prove his case.

The court of appeals concluded that the case presented by Shutt was analogous to that which it faced in *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072 (9th Cir. 1986). In that case, the court of appeals stated:

> The problem with small labor pools is that slight changes in the data can drastically alter appearances. Consequently, in 1979, the EEOC concluded that statistics from small applicant pools such as a pool of 30 persons are not dispositive. 44 Fed. Reg. 11, 999 (1979). 804 F.2d at 1076.

Finally, the court of appeals acknowledged, as it had in *Sengupta*, that in some instances, courts must rely on small sample groups, but that in Shutt's case "there existed no necessity to employ a small group."

ARGUMENT

1. THE PETITION IS UNTIMELY AS IT WAS FILED MORE THAN 90 DAYS AFTER THE COURT OF APPEALS DENIED THE PETITION FOR REHEARING.

"The initial question in this case is one of jurisdiction – whether the petition for certiorari was filed within the period allowed by law." *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 207 (1952). "Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below." *Missouri v. Jenkins*, 495 U.S. 33, 109 L.Ed.2d 31, 50 (1990). As this Court explained in *Jenkins*: "This 90 day

limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." *Id.* Moreover, Sup. Ct. R. 13.4 provides in part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered . . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

In this case, judgment was entered by the court of appeals on January 16, 1991, the file date on the court's decision. Petitioner filed a petition for rehearing, which was denied on September 25, 1991.[2] Petitioner had until December 24, 1991 in which to file his petition with this Court. Because Petitioner did not file until December 30, 1991, the Petition is untimely and must be dismissed for lack of jurisdiction.

Petitioner tries to divert this Court's attention from his untimely filing by not disclosing the denial of his petition for rehearing in his statement of jurisdictional grounds, as required by Rule 14.1(e)(ii), and by inaccurately stating that the Court's judgment was filed on September 30, 1991 (Pet. at 2). The opinion plainly states that it was filed on January 16, 1991, and in the Ninth Circuit the judgment is incorporated into the opinion. On September 30, 1991, the court of appeals made minor

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[2] In addition, no active member of the court of appeals voted for *en banc* consideration as suggested by Petitioner.

amendments to its opinion. The court of appeals did not amend its judgment reversing the district court's judgment and remanding the case with instructions that judgment be entered for the defendants. Therefore, Petitioner cannot use the September 30, 1991 amendments to trigger a new period of time in which to file with this Court.

Furthermore, even if the September 30, 1991 amendment to the opinions were somehow deemed to have modified the January 16, 1991 judgment, they form no basis for starting anew the time in which Petitioner had to file with this Court. In *Minneapolis-Honeywell Regulator Co.*, this Court stated:

> Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or which . . . a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. 346 U.S. at 211.

The September 30 amendments to the opinion do not change any matters of substance or resolve any ambiguity in the January 16 judgment. The amendments can best be described as editorial in nature. Similarly, the September 30 amendments to the opinion do not disturb or revise any legal rights set forth in the January 16, 1991 judgment. The September 30, 1991 amended opinion carries the same judgment issued on January 16, 1991: reversed and remanded with instructions that judgment be entered in defendants' favor. Thus, the September 30 amended

opinion is not a "subsequent judgment" as that term is used in Rule 13.4. Petitioner cannot point to one item amended by the September 30 Order that forms the basis for his Petition that did not exist prior to the amendments. Accordingly, the September 30 amendments did not cause the 90 day filing period to begin to run anew. Therefore, since Petitioner failed to file his petition within 90 days after the court of appeals denied his petition for rehearing, this Court has no jurisdiction over this case.[3]

2. THE COURT OF APPEALS CONCLUSION THAT A SAMPLE OF ELEVEN EMPLOYEES IS TOO SMALL TO BE PROBATIVE OF A DISPARATE IMPACT DISCRIMINATION CLAIM DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THUS PRESENTS NO ISSUE FOR THIS COURT TO REVIEW.

Apart from the jurisdictional deficiencies, this Court should deny the petition for a writ of certiorari because it presents no issues worthy of this Court's review. The first issue presented in the petition is whether the court of appeals properly concluded that a sample pool of 11 employees was too small to support a finding of disparate impact discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621. This Court has consistently noted that a small sample size will "detract

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[3] *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965) and *U.S. v. Adams*, 383 U.S. 39, 41-42 (1966), are not to the contrary. In each of those decisions the amended judgments either decided new issues (*Adams*) or resolved a genuine ambiguity (*Colgate-Palmolive*).

from the value of such [statistical] evidence." *Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977). More recently in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1988), this Court explained that statistical evidence based on "small or incomplete" samples may not be probative of discrimination in a disparate impact case. In the instant case, the court of appeals held that the district court erred in considering only the terminations of seven Zoecon sales representatives. The court of appeals further held that as a matter of law that the 11 sales representatives terminated from both Zoecon and VS Crop was too small of a sample to be probative of discrimination. The court of appeals' conclusion that a sample of 11 employees was too small to be probative of disparate impact age discrimination comports with this Court's decisions, decisions of other courts of appeals, and hardly merits this Court's review. *See, e.g., Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (sample size of 13 too small); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (17 employees); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) (ten terminations); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1389 (11th Cir. 1983), *cert. denied* 464 U.S. 1018 (1983) (12 employees); *Coble v. Hot Springs School District No. 1.*, 682 F. 2d 721, 734 (8th Cir. 1982) (15 or 18 employees).

Contrary to Petitioner's contention (Pet. 6-7), the court of appeals' decision regarding the sample size does not conflict with decisions from other circuits or the Ninth Circuit's decision in *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072 (9th Cir. 1986). Of course, an intra-circuit conflict is not a basis for granting the Petition,

particularly, where as here, the court of appeals has considered the argument and rejected it when it denied the petition for rehearing and rejected the suggestion for *en banc* consideration. See Rule 10. Furthermore, none of the cases cited by Petitioner from other courts of appeals hold that a group of 11 terminated employees is sufficiently large, by itself, to establish a statistical pattern that could be conclusively identified as discriminatory in a disparate impact case. In each of the cited cases there is a recognition of the problems inherent in using small samples in discrimination cases. In *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988), the court of appeals painstakingly noted that it was not sanctioning the use of small samples in disparate impact cases, such as this, where statistical patterns are the entire basis of the plaintiff's claims. In *EEOC v. American Nat. Bank*, 652 F.2d 1176, 1194 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982), the court of appeals was willing to consider a small statistical sample only in the context of "the total range of hiring decisions affecting all categories during a charged period of discrimination." This is not what Petitioner did here. In *Pegues v. Mississippi State Employment Service of Mississippi Employment Security Comm.*, 699 F.2d 760 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983), the court of appeals drew an inference of discrimination in referrals based on a small sample when the standard deviations exceeded 17 (*see* 699 F.2d at 768 n.9) and there was other evidence of discrimination, but refused to find disparate impact liability in testing on the basis of a sample larger than that presented in the instant case where there were no "evidentiary signals of discrimination typically relied upon to bolster such analyses." *Id.* at 774.

Here, Petitioner made no showing of statistical significance. Moreover, there were no "evidentiary signals of discrimination." The court of appeals noted that the fact that the VS Crop Managers may have favored their former employees may have been favoritism but it was not age discrimination. In addition, Petitioner conceded that there had been no discrimination against the VS Crop employees. Furthermore, notwithstanding Petitioner's assertion (Pet. at 7-8), the court of appeals has not stated that an employer must have a minimum number of employees before a disparate impact case can be made. The court of appeals decision is based on the size of the sample, not the size of the employer. Additionally, the court of appeals recognized, as it had in *Sengupta*, that under certain circumstances courts may need to rely on small sample groups, but concluded that in this case "there existed no necessity to employ a small group." The court of appeals' conclusion in this regard comports with decisions from other courts of appeals, including those cited by Petitioner.

3. THE COURT OF APPEALS PROPERLY CONSIDERED THE ISSUE OF SAMPLE SIZE ON APPEAL AS IT HAD BEEN RAISED TO THE DISTRICT COURT AND, IN ANY EVENT, THE COURT OF APPEALS HAD DISCRETION TO HEAR IT.

Finally, there is no merit in Petitioner's contention (Pet. 8) that Respondents raised the issue of sample size for the first time on appeal. This issue was addressed in briefs filed with the district court. *See Watson v. Fort Worth Bank*, 487 U.S. 977 (1988) (plaintiff's statistical evidence may be attacked in briefs filed with the court).

Furthermore, the Petitioner waived this waiver argument, as he first presented it to the court of appeals in his petition for rehearing after the court of appeals had entered judgment on January 16, 1991. See *Geva v. Leo Burnett*, 931 F.2d 1220, 1225 (7th Cir. 1991). In any event, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the court of appeals to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). An appellate court would certainly be justified in considering an issue for the first time on appeal where, as here, "the proper resolution is beyond any doubt. . . . " *Id.*[4]

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[4] Contrary to Petitioner's suggestion (Pet. 11), *Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975), does not support his argument. *Schlesinger* holds that this Court may consider issues not raised below or in the Petition. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS APPENDIX NO. 1

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #:89-35502 Filed: 7/28/89
Nsuit: 4190 Other contract (Div)
Shutt v. Zoecon Corp, et al, et al
Appeal from: Eastern District of Washington (Spokane)

Case type information:
1) civil
2) private
3)

Lower court information:

District: 0980-2 : CV-87-166-AAM
presiding judge: Alan A. McDonald, District Judge
Date Filed: 3/4/87
Date order/judgment: 7/7/89
Date NOA filed: 7/20/89

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
companion:	89-35379	89-35502	7/28/89	

Proceedings include all events.
89-35502 Shutt v. Zoecon Corp, et al, et al

[89-35502]

9/14/90 Filed order CONFATT (KWM) the clerk is requested to schedule this case for oral argument in Seattle the week of 12/3/90. Counsel for aplts is requested to send a copy of its reply brief filed on 7/18/90 to counsel for aple. Within 30 days from the entry of this order, aplts shall dismiss No. 89-35379 or show cause why it should not be dismissed for lack of jurisdiction. [89-35379, 89-35502] (jr) [89-35379 89-35502]

10/1/90 Calendar check performed [89-35502] (th) [89-35502]

10/18/90 CALENDARED: SEATTLE Dec 4, 1990 9:00 am [89-35502] (aw) [89-35502]

12/4/90 ARGUED AND SUBMITTED TO: GOODWIN, WRIGHT, NOONAN [89-35502] (dt) [89-35502]

12/10/90 Rec's aple's add'l citations; served on 12/7/90 to (panel). [89-35502] (jr) [89-35502]

1/16/91 FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. GOODWIN; WRIGHT; NOONAN, author.) FILED AND ENTERED JUDGMENT. [89-35502] (ck) [89-35502]

1/30/91 [1874586] Filed original and 40 copies Appellee Vincent F. Shutt's petition for rehearing with suggestion for rehearing en banc 14 p.pages, served on 1/28/91. (PANEL & ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

5/31/91 Filed order and amended opinion (Judges Alfred T. GOODWIN, Eugene A. WRIGHT,

John T. NOONAN, author) (Orig. opinion id: [1868058-1]) The opinion filed 1/16/91 is amended as follows: (SEE CASEFILE FOR COMPLETE TEXT) [89-35502] (ck) [89-35502]

6/18/91 Filed order (John T. NOONAN): aplts are directed to file by 7/12/91 a response to the petition for rehearing. [89-35502] (jlc) [89-35502]

6/18/91 [1950132] Filed original and 40 copies Appellee Vincent F. Shutt in 89-35502 petition for rehearing with suggestion for rehearing en banc 11 p.pages, served on 6/13/91. (PANEL & ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

7/11/91 Filed Appellant Zoecon Corporation in 89-35502, Appellant Sandoz Crop in 89-35502's response to petition opposing petition for enbanc rehearing [1874586-1] served on 7/10/91. (aplt has submitted an orig & 4 copies – notified to submit 36 more copies) (PANEL) [89-35502] (jlc) [89-35502]

7/25/91 Received an addl. 36 copies of Sandoz Crop Protection Corporation's & Zoecon Corporation's response to petition for rehearing. (ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

9/25/91 Filed order (Eugene A. WRIGHT, Alfred T. GOODWIN, John T. NOONAN): the petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected. [89-35502] (jlc) [89-35502]

9/30/91 Filed order and amended opinion (Judges Alfred T. GOODWIN, Eugene A. WRIGHT, John T. NOONAN) (Orig. opinion id:) REVERSED & REMANDED. The opinion filed 1/16/91 and amended 5/31/91, is further

	amended as follows: (see text) [89-35502] (jlc) [89-35502]
10/22/91	MANDATE ISSUED [89-35502] (jlc) [89-35502]
2/7/92	Received notice form Supreme Court: petition for certiorari filed Supreme Court No. 91-1201 filed on 12/30/91. [89-35502] (jlc) [89-35502]

RESPONDENTS APPENDIX NO. 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT F. SHUTT, Plaintiff-Appellee, vs. SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation, Defendants-Appellants.	No. 89-35502 DC# 87-166-AAM ORDER (Filed Sep. 25, 1991)

Before: WRIGHT, GOODWIN and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Noonan has voted to reject the suggestion for rehearing en banc and Judges Wright and Goodwin so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.